

A Public Prosecutor v Letchumanan

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45-57 OF 1998
AUGUSTINE PAUL J
28 AUGUST 2000

B *Criminal Law — Dangerous Drugs — Trafficking — Presumption under s 37(d) — ‘Anything whatsoever containing’ — Whether include a vehicle — Dangerous Drugs Act 1952 s 37(d)*

C *Criminal Law — Dangerous Drugs — Trafficking — Circumstantial evidence — Accused not owner of motorcycle where drugs were found — No evidence that accused was in charge of motorcycle prior to arrest — Owner of motorcycle not called to give evidence, adverse inference arose — Accused resisted arrest, whether inference of knowledge of dangerous drugs — Whether trafficking proved*

D The accused was charged with trafficking in drugs but at the close of the prosecution’s case, it was ruled that the prosecution had not made out a prima facie case against the accused. The accused was acquitted and discharged. The Public Prosecutor appealed. The issues were: (i) whether custody or control of the motorcycle was sufficient to activate the presumption contained in s 37(d) of the Dangerous Drugs Act 1952 (‘the DDA’) to show that the accused was in possession of the dangerous drugs; (ii) whether circumstantial evidence proved that the accused was in possession of the dangerous drugs; (iii) whether the conduct of the accused in resisting arrest and attempting to run away lead to the inference that he had knowledge of the dangerous drugs; and (iv) whether adverse inference arose.

F **Held**, dismissing the appeal:

(1) A vehicle does not come within the meaning of the words ‘anything whatsoever containing’ in s 37(d) of the DDA. Thus the presumption in s 37(d) did not arise (see p 454A–B).

G (2) In relying on circumstantial evidence, such evidence must point irresistibly to the guilt of the accused. As the accused was not the owner of the motorcycle but merely the rider at the material time and the prosecution failed to adduce any evidence to show the length of time the accused was in charge of the motorcycle prior to his arrest, it cannot be inferred that the accused was in possession of the dangerous drugs (see p 454C–D).

H (3) For the flight of an accused to be capable of amounting to an admission of guilt, there must be a nexus between the conduct of the accused, his flight and the offence in question. On the facts of this case, there is no such nexus in existence. All that it showed was that the accused had knowledge of the dangerous drugs in the motorcycle, but mere knowledge without more would not be sufficient to constitute custody or control thereof (see p 455A–B).

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- (4) The prosecution could have relied on the conduct of the accused to establish his guilt if it had called the owner of the motorcycle to testify that the motorcycle had been with the accused for quite some time and that the dangerous drugs recovered were not his. Thus the failure of the prosecution to call such a material witness was fatal in view of s 114(g) of the Evidence Act 1950 (see p 455C–D).

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[Bahasa Malaysia summary]

Tertuduh telah didakwa untuk mengedar dadah tetapi di akhir kes pendakwaan, telah diputuskan bahawa pihak pendakwaan tidak membuktikan kes prima facie terhadap tertuduh. Tertuduh telah dibebaskan dan dilepaskan. Pendakwa Raya telah merayu. Isu-isu adalah: (i) sama ada jagaan atau kawalan motosikal adalah mencukupi untuk membangkitkan anggapan yang terkandung di dalam s 37(d) Akta Dadah Berbahaya 1952 ('ADB') untuk menunjukkan bahawa tertuduh memiliki dadah berbahaya; (ii) sama ada keterangan mengikut keadaan membuktikan tertuduh memiliki dadah berbahaya tersebut; (iii) sama ada tindakan tertuduh di dalam melawan penahanan dan cubaan untuk melarikan diri membangkitkan inferens bahawa beliau mempunyai pengetahuan mengenai dadah berbahaya tersebut; dan (iv) sama ada inferens bertentangan berbangkit.

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Diputuskan, menolak rayuan tersebut:

- (1) Suatu kenderaan tidak dilingkungi di bawah maksud perkataan-perkataan 'apa-apa sekali pun yang mengandungi' di dalam s 37(d) ADB. Dengan itu, anggapan di dalam s 37(d) tidak timbul (lihat ms 454A–B).
- (2) Di dalam bergantung kepada keterangan mengikut keadaan, keterangan sedemikian mestilah menunjukkan dengan jelas akan kebersalahan tertuduh tersebut. Oleh kerana tertuduh bukanlah pemilik motosikal tersebut tetapi hanyalah penunggang pada masa matan tersebut dan pihak pendakwaan gagal untuk mengemukakan sebarang keterangan untuk menunjukkan tempoh masa tertuduh telah bertanggungjawab ke atas motosikal tersebut sebelum penahanannya, tidak boleh disiratkan bahawa tertuduh memiliki dadah berbahaya tersebut (lihat ms 454C–D).
- (3) Bagi cubaan melarikan diri tertuduh untuk terjumlah kepada pengakuan bersalah, mestilah terdapat hubungan (nexus) antara tindakan tertuduh, lariannya dan kesalahan yang dipersoalkan. Berdasarkan fakta kes, tidak terdapat hubungan sedemikian yang wujud. Apa yang ditunjukkan adalah tertuduh mempunyai pengetahuan dadah berbahaya di dalam motosikal, tetapi pengetahuan semata-mata dan tiada apa-apa lagi tidak mencukupi untuk terjumlah kepada jagaan dan kawalan (lihat ms 455A–B).

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- A (4) Pihak pendakwaan boleh bergantung kepada tindakan tertuduh untuk membuktikan kebersalahannya jika ia memanggil pemilik motosikal untuk memberikan keterangan bahawa motosikal tersebut berada bersama tertuduh untuk masa yang agak lama dan bahawa dadah berbahaya yang dijumpai bukanlah miliknya. Oleh itu, kegagalan pihak pendakwaan untuk memanggil saksi penting sedemikian adalah memudaratkan apabila melihat s 114(g) Akta Keterangan 1950 (lihat ms 455C–D).]
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Notes

- C For cases on presumption under s 37(d) of Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 77–96. For cases on trafficking generally, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 126–303.

Cases referred to

- D *Bhagat Bahadur v State* [1996] Cri LJ 2201 (refd)
Chan Kwok Keung & Anor v The Queen [1990] 1 CLJ 411 (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36 (refd)
Pendakwa Raya v Mansor bin Mohd Rashid [1996] 3 MLJ 560 (refd)
PP v Chan Peng Fatt [2000] 1 MLJ 179 (refd)
- E *PP v Lin Lian Chen* [1992] 2 MLJ 561 (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132 (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)

Legislation referred to

- F Dangerous Drugs Act 1952 ss 39B(1)(a), 39B(2), 37(d)
Evidence Act 1950 ss 8, 114(g)

Appeal from: Arrest Case No D81–54 of 1997 (Magistrate's Court, Kuala Lumpur)

- G *Azhar bin Abdul Hamid (Lukman bin Zainuddin with him)* (Attorney General's Chambers) for the prosecution.
M Kayveas (Blanche Kayveas & Co) for the accused.

Augustine Paul J: The accused was charged with trafficking in 56.2g of a mixture of heroine and monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. He claimed trial to the charge. At the close of the case for the prosecution I ruled that the prosecution had not made out a prima facie case against the accused and, accordingly, acquitted and discharged him without calling upon him to enter his defence. This appeal is by the public prosecutor against the order made by me.

- I The prosecution called a total of six witnesses in support of its case. Khalid bin Ujang ('PW1') and Kamarulzaman bin Sabirin ('PW2') were police photographers. Inspector Tansli Mering ('PW3') was the

investigating officer of the case while Inspector Mohd Azam bin Abdul Razak ('PW5') was the raiding officer. Inspector Wan Azlan bin Wan Mamat ('PW6') is an officer experienced in drug related matters. Liew Chee Far ('PW4') was the owner of motorcycle bearing registration number WDU 4259 in 1997. On 26 November 1997 PW5 led a party of seven police officers consisting of G Jaganathan a/l R Govindan, Abdul Razak bin Abdul Majid, Abdul Rahman bin Mohd Yusuff, Abdullah bin Haji Abdul Rahman, Sum Kok Wah, Razali bin Md Kassim and Mohd Noor bin Mohd Dom to conduct an observation at a shopping area in Taman Pelangi Jaya Satu, Sentul, Kuala Lumpur in respect of a male Indian using a blue Suzuki RG Sport motorcycle bearing registration number WDU 4259 ('the motorcycle'). They kept observation for about 30 minutes. They then saw the motorcycle coming towards that area. It was ridden by a male Indian. The motorcycle made a U-turn and stopped. As PW5 said in his evidence,

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Semasa lelaki India di atas motor saya melihat suspect menoleh kiri kanan seperti mencari seseorang. Tidak ada sesiapa bersama tertuduh di atas motosikal. Kenderaan tidak banyak di tempat itu pada masa itu kerana lepas hujan. Hujan masih renyai-renyai. Tempat motosikal berhenti dari tempat saya lebihkurang 6-7 kaki. Selepas motosikal itu berhenti saya lihat lelaki India tersebut menoleh kiri dan kanan seperti mencari seseorang dan saya nampak juga satu plastik berwarna oren dalam raga motosikal tersebut. Saya dapat juga motosikal itu masih lagi enjinnya belum dimatikan. Saya telah arahkan Cpl Md Noor untuk menangkap suspek. Cpl Md Noor menghampiri saspek dari arah belakang dan saya dengar Cpl Md Noor menjerit 'Polis. Jangan lari' dan terus menangkap suspek. Pada masa yang sama saya pun menghampiri suspek dari arah hadapan suspek. Saya memperkenalkan diri 'Polis' dan sebut 'Jangan melawan'. Semasa saya dan Cpl Md Noor menangkap suspek, suspek melawan bergelut dan cuba melarikan diri menyebabkan motosikal terbalik. L/Cpl Rahman dan G Jaganathan membantu semasa tangkapan.

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Selepas tangkapan saya dapati suspek sudah boleh ditangkap. Saya mengambil bungkusan oren dalam raga motosikal suspek. Dan saya buka plastik oren tersebut di hadapan suspek dan saksi polis lain saya dapati di dalamnya ada satu bungkusan keratan akhbar berbahasa Tamil bertarikh 14 November 1997 yang mana di dalamnya terdapat dua bungkusan plastik yang mengandungi bahan serbuk dan ketulan kecil, bahan berwarna merah jambu yang saya syaki dadah heroin. Selepas itu saya membawa balik suspek bersama barang kes ke pejabat narkotik, IPK KL. Semasa dalam perjalanan balik ke IPK KL saya sendiri yang pegang barang kes dan suspek sentiasa bersama saya.

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Subsequently PW5 handed the accused and the exhibits to PW3. PW3 sent the two packets suspected to contain heroin to the chemist for analysis who found the two packets to contain 56.2g of heroin and monoacetylmorphines. The chemist report was duly served on the accused. PW4 was the previous owner of the motorcycle. As he said in his evidence,

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Dalam tahun 1997 saya mempunyai sebuah motosikal no WDU 4259. Jenisnya Suzuki Cub. Saya tidak lagi memiliki motosikal tersebut. Motosikal itu telah dijualkan kepada seorang yang bernama Ganesan a/l Suppiah yang berkerja di sekolah saya pada bulan September 1997. Harga dijual ialah RM2,800. Tiada perjanjian jualbeli dibuat. Saya tidak pergi ke JPJ untuk

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A meneruskan pemindahan hakmilik tetapi saya ada serahkan JPJ K3 dan release letter, salinan IC saya kepada Ganesan a/l Suppiah. Saya diberitahu oleh beliau bahawa hal pemindahan hakmilik akan diuruskan.

B Before closing its case the prosecution offered to the defence L/Kpl G Jaganathan, D/Kpl Abdul Razak bin Abdul Majid, L/Kpl Abdul Rahman Mohd Yusoff, Sjn/Major Abdullah bin Haji Abdul Rahman, L/Kpl Sum Kok Wah, L/Kpl Razali bin Md Kassim, D/Kpl Mohd Nor bin Mohd Dom, Inspector Mohd Khalid bin Nordin and the chemist, Ismail bin Talib. Learned counsel for the accused said that he did not wish to call the witnesses.

C In considering whether the prosecution had made out a prima facie case against the accused a matter of prime consideration is the fact that he was not the owner of the motorcycle. It had been sold by PW4 to one Ganesan a/l Suppiah in September 1997. However, the accused was riding the motorcycle at the material time with the dangerous drugs in its carrier. Thus even though the motorcycle did not belong to the accused it was in his custody or control at the material time. That raises the question of whether proof of custody or control of the motorcycle is sufficient to activate the presumption contained in s 37(d) of the Act to show that the accused was in possession of the dangerous drugs. The subsection reads as follows:

E Any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

F The question to be decided is whether a vehicle, which would include a motorcycle, is capable of coming within the ambit of the words 'anything whatsoever containing any dangerous drug' in the subsection. This question was answered by Thomson J (as he then was) in *Tong Peng Hong v PP* [1955] MLJ 232 at p 233:

G The words 'anything whatsoever' by themselves have as wide a meaning as any words can have but that meaning is governed and greatly restricted by the word 'containing'. A thing containing another thing is not synonymous with a thing in which that other thing is. To take an extreme example, it is not correct to say the earth contains the fly which at the moment is walking up the wall in my chambers. Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction. The jar contains the jam but the cupboard contains the jar. In short, a container is not something in which another thing is. It is something which surrounds or holds another thing so as to prevent that other thing from being elsewhere.

H It was accordingly held that a lorry does not come within the meaning of the words 'anything whatsoever containing' in the subsection. Similarly it has been held that a car (see *Syed Ali bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132) and a television set (see *PP v Chan Peng Fatt* [2000] 1 MLJ 179) do not come within the subsection. In following *Tong Peng Hong*, Edgar Joseph Jr SCJ in writing for the (then) Supreme Court in *PP v Lin Lian Chen* [1992] 2 MLJ 561 said at p 567:

In the first place, we would respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v PP* [1955] MLJ 232, that a vehicle in which a drug is carried does not ipso facto fall within the words 'anything whatsoever containing any dangerous drug' and therefore in such a case, the presumption contained in s37(d) does not arise.

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It is therefore my view that a motorcycle does not come within the meaning of the words 'anything whatsoever containing' in s 37(d) of the Act. The presumption contained in the subsection therefore does not arise. The presumption contained in s 37(h) of the Act also does not arise as the dangerous drugs were not found concealed in a specially constructed compartment of the motorcycle.

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On the facts of this case, therefore, the prosecution must rely on circumstantial evidence to prove that the accused was in possession of the dangerous drugs. It is settled law that where the prosecution is relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused (see *Chang Kim Siong v PP* [1968] 1 MLJ 36). The facts of this case reveal that at the material time the accused was the rider of the motorcycle. He was therefore in charge of it. But he was not its owner. The prosecution did not adduce any evidence to show the length of time during which the accused was in charge of the motorcycle prior to his detention. In such circumstances it cannot be inferred that the accused was in possession of the dangerous drugs. In this respect I consider it pertinent to refer to *Lin Lian Chen* where Edgar Joseph Jr SCJ said at p 567:

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Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits.

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However, it is possible for an inference of possession to be made if there had been evidence to show that the accused had the use of the motorcycle for quite a while. That will eliminate the probability that he took it from its owner, Ganesan a/l Suppiah, with the packet containing the dangerous drugs in the carrier. If such a probability had been eliminated by the prosecution by calling Ganesan a/l Suppiah as a witness then it can be inferred that the accused was in custody of the dangerous drugs. The further evidence of the conduct of the accused in resisting arrest and attempting to run away in such circumstances would lead to the inference that he had knowledge of the dangerous drugs. In that event the prosecution would have proved that the accused was in possession of the dangerous drugs. However, in the absence of Ganesan a/l Suppiah being called as a witness the prosecution is only left with the evidence of conduct of the accused. It must be observed that though evidence of conduct is admissible under s 8 of the Evidence Act 1950 the weight of such evidence depends on the facts of each case. It must be considered in the totality of the evidence adduced (see *Pendakwa Raya v Mansor bin Mohd Rashid* [1996] 3 MLJ 560). In *Chan Kwok Keung & Anor v The Queen* [1990] 1 CLJ 411

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- A** it was held that for the flight of an accused to be capable of amounting to an admission of guilt there must be a nexus between the conduct of the accused, his flight and the offence in question. Mere absconding is not such vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v State* [1996] Cri LJ 2201). On the facts of this case there is no nexus between the conduct of the accused and the offence with which he has been charged. In the circumstances the conduct of the accused can only show that he had knowledge of the dangerous drugs in the motorcycle. But as Edgar Joseph Jr SCJ said in *Lin Lian Chen* at p 567:
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- C** ... mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction.

- The prosecution could have relied on the conduct of the accused to establish his guilt if it had called Ganesan a/l Suppiah to testify that the motorcycle had been with the accused for quite a while and that the dangerous drugs recovered are not his. The evidence of Ganesan a/l Suppiah is therefore material to unfold the narrative upon which the prosecution case is based. As he is a material witness he ought to have been called to testify and the failure to do so is fatal to the prosecution case on the application of s 114(g) of the Evidence Act 1950.
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- E** In the upshot I ruled that the prosecution had not made out a prima facie case against the accused and, accordingly, acquitted and discharged him without calling upon him to enter his defence.

Appeal dismissed.

- F** Reported by Wong Siok Chin
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